Supreme Court, U.S.
FILED
JAN 25 1996
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JACK F. TRAHAN, *Petitioner,*

v.

EMMA J. TRAHAN, *Respondent.*

On Petition for a Writ of Certiorari to the
Texas Court of Appeals, Third District, at Austin

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED FOR REVIEW

Whether the state court's refusal to apply 10 U.S.C. § 1408 (c) (1) to suspend a state judgment dividing military retired pay violates the Supremacy Clause of the United States Constitution?

LIST OF PARTIES

The caption of the case in this Court contains the names of the parties.

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OPINION BELOW

The opinion of the Texas Court of Appeals, Third District, at Austin (A-1), is reported at 894 S.W.2d 113. The denial of review by the Texas Supreme Court (A-18) and the refusal of rehearing by the Texas Supreme Court (A-19) were without opinion.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a) because the opinion below draws into question the validity of a federal statute, the 1990 amendment to 10 U.S.C. § 1408 (c) (1), the Uniformed Services Former Spouses Protection Act, by holding that the 1990 amendment violates the due process clause of the United States Constitution.

The lower court's holding that the state law doctrine of res judicata prevails over a federal statute, pertaining to a federally regulated matter, directly conflicts with the Supremacy Clause, and this Court's holdings in *Fleming v. Rhodes*, 331 U.S. 100 (1947), a case in which this Court refused to give effect to state court eviction judgments that conflicted with federal statutes, and *Ridgway v. Ridgway*, 454 U.S. 46 (1981), a case in which this Court refused to give effect to the provisions of a state court divorce judgment that conflicted with federal statutes. *See* Supreme Court Rule 10 (c).

The holding of the court below, that Respondent has acquired a vested right in Petitioner's federal military retired pay as the result of a state court judgment, conflicts with this Court's holdings in *U.S. v. Teller*, 107 U.S. 64 (1883);

Frisbie v. U.S., 157 U.S. 160 (1895); and *Lynch v. U.S.*, 292 U.S. 571 (1934), that there is no vested right to military retired pay, as well as this Court's holdings that there is no vested right to benefits under other federal retired pay statutes in *Flemming v. Nestor*, 363 U.S. 603 (1960) (Social Security benefits), and *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (Railroad Retirement benefits). *See* Supreme Court Rule 10 (c).

The opinion of the court below, that the 1990 amendment to 10 U.S.C. § 1408 (c) (1) is unconstitutional, has decided an important federal question in a way that conflicts with the decisions of another State's court of last resort, California, in *In re Marriage of Curtis*, 9 Cal.Rptr.2d 145 (Cal.App. 1 Dist. 1992, review denied), and *In re Marriage of Olson*, 30 Cal.Rptr.2d 306 (Cal.App. 2 Dist. 1994, review denied). *See* Supreme Court Rule 10 (b).

The judgment sought to be reviewed was entered by the Texas Court of Appeals, Third District, at Austin, on March 8, 1995 (A-15) and was accompanied by written opinion (A-1). The points of error presented to the Texas Court of Appeals by Respondent, Emma Trahan, who was Appellant in the court below, are reprinted at A-16. The motion for rehearing in that court was overruled on April 5, 1995 (A-18), and the Points of Error of Petitioner, Jack Trahan, who was Appellee in the court below, presented in the motion for rehearing to that court are reprinted at A-17. The Texas Supreme Court denied review (by application for writ of error) with the notation "writ denied" on August 1, 1995 (A-19). The motion for rehearing in the Texas Supreme Court was overruled on October 27, 1995 (A-20) and is the final judgment or decree rendered by the highest court of a state in which a decision could be had. Under

regular Texas practice, the record of this case has been returned to the Texas Court of Appeals, Third District, P.O. Box 12547, Austin, Texas 78711. The trial court's judgment, which was reversed and rendered by the Texas Court of Appeals, is reprinted at A-21. The pleadings and stipulations referred to in the trial court's judgment are reprinted beginning at A-24.

STATEMENT UNDER RULE 29.4(b)

Because the lower court's opinion has held the 1990 amendment to 10 U.S.C. § 1408(c)(1) unconstitutional under the Due Process Clause, and neither the United States nor any federal department, office, agency, officer, or employee is a party, the provisions of 28 U.S.C. § 2403(a) may be applicable.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

United States Constitution, Article I, § 8

The Congress shall have Power . . . . To raise and support Armies . . . . To provide and maintain a Navy; . .

United States Constitution, Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

10 U.S.C. § 1408 (c) (1)

. . . A court may not treat [military] retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

Pub. L. No. 101-510, § 555 (e), 104 Stat. 1570 (1990)

The amendment made by subsection (a) [amending 10 U.S.C. § 1408 (c) (1)] shall apply with respect to judgments issued before, on, or after the date of the enactment of this Act [Nov. 5, 1990]. In the case of a judgement issued before the date of the enactment of this Act, such amendment shall not relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act.

32 C.F.R. § 63.1 (7-1-95 Edition)

Under 10 U.S.C. 1408, this part establishes policy and authorizes direct payments to a former spouse of a member from retired pay in response to court-ordered alimony, child support, or division of property.

32 C.F.R. § 63.6 (c) (7) (7-1-95 Edition)

(c) *Review of Court Orders.* (7) . . . For court orders issued before June 26, 1981, subsequent amendments after that date to provide for a division of retired pay as property are unenforceable under this part.

STATEMENT OF THE CASE

This case concerns the refusal of a state court to apply federal law, the 1990 amendment to 10 U.S.C. § 1408 (c) (1), to suspend a prior state court judgment partitioning Petitioner's military retired pay. Petitioner served in the United States Air Force between July 3, 1941, and April 30, 1965, when he retired. Petitioner was married to Respondent during his service in the Air Force and the parties were divorced in 1965. The divorce decree made no mention or disposition of Petitioner's military retired pay. See opinion below, 894 S.W.2d at 114 (A-2).[1] In 1977, Respondent brought a partition action to recover a portion of Petitioner's pay. The Texas district court awarded Respondent a portion of Petitioner's military retired pay on the theory that it was community property which was not considered at divorce. This decision was ultimately reversed by the Texas Supreme Court in *Trahan v Trahan*, 626 S.W.2d 485 (Tex. 1981), in recognition of this Court's decision in *McCarty v. McCarty*, 453 U.S. 210 (1981),

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[1] The parties were subsequently remarried and divorced again, in 1971, but the second marriage has no bearing on the issue in this case, because Petitioner had already retired at the time of the second marriage. The divorce decree in the second divorce made no mention of Petitioner's military retired pay.

holding that Respondent was entitled to none of the military retired pay paid, or to be paid, to Petitioner.

After the enactment of 10 U.S.C. § 1408 (c) (1), the Uniformed Services Former Spouses' Protection Act, in 1982, Respondent brought a second partition action, relying on the provisions of the Act. The Texas court again ordered a partition of Petitioner's retired pay, of payments made from and after June 25, 1981. Petitioner appealed, and the Texas Court of Appeals, Third District, at Austin, in *Trahan v. Trahan*, 682 S.W.2d 332 (Tex. App.--Austin 1984, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1002 (1986), affirmed the partition, holding that the doctrine of res judicata did not apply to the case. The Texas Supreme Court refused to review this decision. The decision was appealed to this Court but the appeal was denied.[2] Following the 1990 amendment to 10 U.S.C. § 1408 (c) (1), Petitioner brought an action in the state district court for a declaratory judgment that the partition judgment for division of retired pay had become invalid, for payments after November 1992, because of the requirements of the amendment. *See* A-24. The trial court granted the declaratory judgment, holding that the provisions of the 1983 judgment were no longer valid with respect to installments of Petitioner's military retired pay that are, or have been paid, after November 5, 1992. *See* A-21. Respondent appealed, resulting in the opinion of the court below, which reversed the trial court, and rendered judgment for Respondent. *See* A-1, A-15.

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[2] The disposition was, "The appeal is dismissed for want of a substantial federal question. Justice White would postpone jurisdiction to the hearing of the case on the merits." *Id.*, 475 U.S. 1002.

During the 1970's, state courts in the community property states, began treating federal retirement benefits, including military retired pay, as community property, and dividing it at divorce like other property. This practice resulted in decisions of this Court such as *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), dealing with Railroad Retirement benefits, and *McCarty v. McCarty*, 453 U.S. 210 (1981), which held that the federal law establishing military retired pay made such pay the personal entitlement of the service member, and thereby pre-empted state marital property law, and that the spouse of the retired officer was not entitled to a share of the pay.

Following the *McCarty* decision, efforts were made to have Congress change the law to permit state courts to divide military retired pay in accord with principles of state law. These efforts culminated in 10 U.S.C. § 1408 (c) (1), the Uniformed Services Former Spouses' Protection Act, enacted September 8, 1982. This Act permitted the states to divide disposable retired pay, for pay periods beginning after June 25, 1981, in accordance with state law, under certain conditions, and with certain specific limitations.

Despite clear indications of Congressional intent that divorce cases decided before *McCarty* were not to be reopened,[3] state courts in the community property states

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[3] "In additions [sic], the conferees intend this provision to preclude recognition of changes to court orders finalized before the *McCarty* decision if those changes are effected after the *McCarty* decision and as a direct result of the enactment of the new title X [10 U.S.C.A. § 1408] of this conference report. In other words, the courts should not favorably consider applications based on the enactment of

began to use the Former Spouses' Protection Act as the basis to reopen, or to bring partition actions, to divide military retired pay that had not been mentioned in pre-*McCarty* divorces. Respondent's second partition action in this case was one of the many such suits that reached this result.

Congress became aware of the numerous, unintended divisions of military retired pay of members or former members of the service, who had been divorced before the *McCarty* decision. In 1988, the House Committee on Armed Services expressed its concern with this practice in state courts:

> Some misunderstanding may exist regarding the legislative intent of the Congress on one aspect of the Uniformed Services Former Spouses' Protection Act (USFSPA), title X of Public Law 97-252. Some courts are apparently reopening divorce cases decided before the *McCarty* vs. *McCarty* decision of June 26, 1981, and are dividing military retirement pay because the original divorce decree was silent on the subject.

House Report 100-563, April 5, 1988, on the National Defense Authorization Act for Fiscal Year 1989, at 256.

The report states that, "Congress did not intend this to happen." *Id.*

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this title to reopen cases finalized before the *McCarty* decision wherein military retired pay was not divided." House Conference Report 97-749, 1982 U.S. Code Cong. & Ad. News 1573.

The practice in the state courts continued, however, and on November 5, 1990, Congress passed Public Law No. 101-510, Section 555 (1990), amending the Uniformed Services Former Spouses' Protection Act, to correct the unintended application of the Act by state courts to reopen pre-McCarty divorces. The purpose of P.L. No. 101-510, Section 555 (1990), entitled "Prohibition of Certain Retroactive Court Orders", the full text of which is reprinted at A-36 (hereinafter referred to as "the 1990 amendment"), was to prohibit or eliminate *any* subsequent division of military retired pay where a service member had been divorced in a case finalized before the *McCarty* decision, and the divorce decree had not made a specific disposition of the military retired pay.

Congress declared its prohibition against subsequent divisions in the 1990 amendment, as follows:

> A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

10 U.S.C. § 1408 (c) (1) (1990). Congress applied the prohibition to existing judgments, stating that, "The amendment...shall apply with respect to judgments issued before, on, or after the date of the enactment of this Act." *See* Sec. 555 (e) of P.L. 101-510, 104 Stat. 1570 (A-37 to A-38). But, with respect to such existing judgments, the Act applied only after a grace period of two years after the date of the Act. "In the case of a judgement issued before the date of the enactment of this Act, such amendment shall not relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act." *Id.*

The House Report on the National Defense Authorization Act for Fiscal Year 1991, states Congress' intent in passing the 1990 amendment:

> The two modifications to current law the committee would make this year reflect a public policy judgment on the appropriate role of the federal government in limiting state court jurisdiction in divorce cases involving military retired pay that is consistent with the balancing of state and federal interests that has been the hallmark of this law since its inception.
>
> The committee is concerned because some state courts have been less than faithful in their adherence to the spirit of the law. The reopening of divorce cases finalized before the Supreme Court's decision in *McCarty v. McCarty* that did not divide retired pay continues to be a significant problem. Years

> after final divorce decrees have been issued, some state courts, particularly those in California, have reopened cases (through partition actions or otherwise) to award a share of retired pay.
>
> * * *
>
> This provision would apply to judgments issued before, on, or after the date of enactment of this Act, but only with respect to any requirement to make payments pursuant to such judgments after the date of enactment. Thus, individuals divorced before the *McCarty* decision who have had their cases reopened would not be relieved of the obligation to make payments until after the effective date of the Act.

House Report No. 101-665, 1990 U.S. Code Cong. & Ad. News 3005. *See* A-40 for the full text of the House Report dealing with the amendments to the Uniformed Services Former Spouses' Protection Act.

The House bill, which was passed in lieu of the Senate bill, was further reviewed by a conference committee of the House and Senate. The House Conference Report reiterated the purpose of the 1990 amendment, explained that the application to existing judgments was prospective only, and explained the purpose of the grace period before the suspension of such judgments:

> The house bill would provide that if a final decree of divorce, dissolution, annulment, or

> legal separation was issued before the *McCarty* decision and did not treat military retired pay as the property of both the retired member and the former spouse, then the court, subsequent to *McCarty*, may not divide retired pay between the retired member and the former spouse. If a court, subsequent to *McCarty*, had entered such an order, the House bill would require the retired member to make any payments that were due before the date of enactment of this bill, but the member would be relieved of the obligation to make any further payments.
>
> * * *
>
> The conferees believe, however, that a reasonable period of time is needed for individuals to make adjustments required by the termination of payments ordered under decrees issued prior to the date of enactment of this bill. Accordingly, the conference agreement would require individuals to continue to make payments ordered prior to the date enactment of this bill during the two-year period after such enactment.

House Conference Report 101-923, 1990 U.S. Code Cong. & Ad. News 3166. *See* A-42 for the full text of the House Conference Report dealing with the amendments to the Uniformed Services Former Spouses' Protection Act.

The Petitioner in this case made all payments to Respondent from his military retired pay required by the

1983 state partition judgment through November 1992, and then instituted this suit for a declaratory judgment mentioned above. *See* A-24. Respondent filed her original answer and a motion for contempt. *See* A-28. The trial court granted the declaratory judgment, holding that the provisions of the 1983 judgment were no longer valid with respect to installments of Petitioner's military retired pay that are, or have been paid, after November 5, 1992. *See* A-21.

Respondent appealed, resulting in the opinion of the court below, which reversed the trial court, and rendered judgment for Respondent. *See* A-1. The court below recognized that previous Texas decisions, including its own in the 1983 *Trahan* partition, had not correctly applied the 1982 version of 10 U.S.C. § 1408(c)(1) [referred to in the opinion as the USFSPA].

> Despite several decisions to the contrary, it is now apparent that the original USFSPA, as enacted in 1982 was not intended to apply retroactively. [citations omitted] In first enacting the USFSPA, Congress did not intend for courts to allow the reopening of divorce cases that had become final before the *McCarty* decision.

Id., 894 S.W.2d at 116 (A-5 to A-6). The court below recognized that the purpose of the 1990 amendment was to correct this situation.

> In enacting the 1990 amendment, the intent of Congress to cure an unintended interpretation of the USFSPA by the courts is abundantly clear.

* * *

> The intent evident .... is that section 1408(c)(1) applies to final judgments issued before the 1990 USFSPA amendment and suspends any further payment to be made pursuant to a final judgment after November 5, 1992, two years after the enactment of the amendment.

Id., 894 S.W.2d at 116, 117 (A-7, A-8). Nevertheless, the court sustained Respondent's points of error, specifically finding the 1990 amendment to be unconstitutional.

> In her first two points of error, [Respondent] complains (1) the trial court erred in failing to hold that res judicata barred reopening the 1983 judgment regardless of the 1990 amendment, and (2) the trial court's retroactive application of the 1990 amendment to a valid judgment of a Texas court is unconstitutional under the due process clause of the United States Constitution.
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> * * *
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> We therefore sustain [Respondent's] first two points of error, reverse the trial-court judgment, and render judgment that the 1983 judgment .... is a valid, subsisting and enforceable judgment.

Id., 894 S.W.2d at 115, 119 (A-4 to A-5, A-14).

> The rationale for this holding is that the 1990

Amendment did not preempt the res judicata effect of the 1983 state partition judgment because that judgment established for Respondent a vested right in Petitioner's military retired pay.

> Private rights of parties which have become vested under a judgment cannot be taken away without compensation by a subsequent legislative act.
>
> * * *
>
> The 1983 trial-court judgment, affirmed by this court in 1984, awarded [Respondent] the legal right to 38.96 percent of [Petitioner's] right to retired pay .... With our decision in that case, [Respondent's] right vested. Res judicata barred re-opening the issue of whether [Respondent] possessed such a right. Any subsequent amendment of USFSPA did not destroy that right.

Id., 894 S.W.2d at 118, 119 (A-12, A-14).

ARGUMENT AMPLIFYING THE REASONS CERTIORARI SHOULD BE GRANTED

Congress has declared the problem which this case involves a significant one. Its 1990 amendment to 10 U.S.C. § 1408 (c) (1), was specifically designed to cure that problem. The refusal of a state court, in a major community property jurisdiction, to follow and apply the amendment makes the problem even more significant, and constitutes a compelling reason for granting the Writ in this case. The

congressional policy and intent, in making the 1990 amendment, is clear, and in this case is not disputed by the court below, which still refused to honor it. The refusal of the Texas Supreme Court to review the decision of the court below, assures that the Texas courts will follow this decision, and continue to refuse to apply the 1990 amendment to the many other existing partition judgments in Texas that the 1990 amendment is intended to suspend. Texas is a large jurisdiction, having within its population a disproportionate number of retired military personnel. A great many of those retirees will be adversely affected by the refusal of the Texas courts to follow the federal law. The decision below may well be followed by the courts of other jurisdictions, instead of the California decisions, which have upheld the 1990 amendment. Citizens of different states will receive different treatment under the same federal statute.

The decisions of this Court have established that, under the Supremacy Clause, all state law is pre-empted in the matter of military retired pay, except to the degree Congress has expressly permitted state law application. The right to receive military retired pay, and the right of state courts to divide it at divorce, stem exclusively from the federal statutes. The decisions of this Court have established that State court judgments, including judgments in the area of domestic relations, like other state law, must give way before an exercise of Congress' power under the Supremacy Clause. This Court's decisions have established that neither the service member nor the member's spouse have any "vested rights", in the constitutional sense, in the member's military retired pay. The rights of individuals to military retired pay cannot vest so as to prevent the effect of subsequent amendments to the statutes by Congress, that may redistribute the pay or withdraw it altogether. Therefore, a

state court, exercising power derived from the federal statutes, cannot by judgment elevate such rights to a vested status, and place them beyond the power of Congress, under the Supremacy Clause.

In the area of domestic relations, this Court, "has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." *Ridgway v. Ridgway*, 454 U.S. at 54 (1981). The federal law pertaining to military retired pay in 1981, as construed by this Court in *McCarty*, completely pre-empted the application of state community property law, and this Court has held that Congress could change this state of the law only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property. *Mansell v. Mansell*, 490 U.S. 581 (1989).

When Congress made such a grant of authority in 1982, by enacting 10 U.S.C. § 1408 (c) (1), it granted only a limited right to the States to treat military retired pay as community property. *Mansell v. Mansell, supra*. It is now clear, and the court below conceded, that one of the limits Congress intended was that the statute not be applied retroactively to re-open divorce judgments issued before the date of the *McCarty* decision. 894 S.W.2d at 116 (A-6). The court below further recognized that the 1990 amendment was enacted to correct this misapplication of 10 U.S.C. § 1408 (c) (1) by the state courts, 894 S.W.2d at 116-117 (A-7 to A-8), yet the court below held that Congress could not correct this misapplication of federal law through its enactment of the 1990 amendment. 894 S.W.2d at 119 (A-14).

The holding by the court below that a prior state court judgment establishing private rights between the parties could prevent the effect of subsequent Congressional legislation, enacted within Congress' constitutional sphere of control, was rejected by this Court in *Fleming v. Rhodes*, 331 U.S. 100 (1947). In that case, various landlords in Texas had obtained state court judgments evicting tenants of defense-area housing in suits for restitution of leased property. Thereafter, Congress enacted a statute (the Price Control Extension Act) restricting the removal of such tenants, and suit was brought, in reliance upon the statute, to enjoin the evictions under the state court judgments. The trial court refused to enjoin the evictions, but this Court reversed.

> It is immaterial whether the state judgments were obtained before or after the effective date of the Extension Act. The effort of the appellant is to enjoin future proceedings for eviction after the acquisition by the landlord appellees through valid judgments of what the district court characterized as "vested rights." Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. . . . *The rights acquired by judgments have no different standing.*

Id, 331 U.S. at 106-107 (emphasis added). Because the effect of the 1990 amendment to the USFSPA was only as to payments of retired pay made after the date of the amendment, the *Fleming v. Rhodes* case should be controlling.

The lower court's holding is also in conflict with this

Court's holding in *Ridgway v. Ridgway, supra*, that, "specifically, a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments. [Citations omitted]. That principle is but the necessary consequence of the Supremacy Clause of our National Constitution." *Id.*, 454 U.S. at 55.[4]

The notion that rights to military retired pay can become vested by a state court judgment is in conflict with this Court's decisions, which have consistently held that a military service member has no vested right to retired pay, and that such retired pay can be redistributed or withdrawn at any time in the discretion of Congress. *See U.S. v. Teller*, 107 U.S. 64, 68, (1883); *Frisbie v. U.S.*, 157 U.S. 160, 166 (1895); *Lynch v. U.S.*, 292 U.S. 571, 577 (1934).

This rule applies to all aspects of military retired pay, including the circumstances of obtaining it. *Frisbie v. U.S., supra*, was a case in which a federal statute, pertaining to the

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[4] The portion of the lower court's opinion (A-10, and 894 S.W.2d at 117 - 18) distinguishing *Ridgway* from the case at bar is unsupported by the *Ridgway* opinion, and is an incorrect interpretation of this Court's opinion, similar to the lower court's misinterpretation of footnote 5 of *Mansell v. Mansell*, 490 U.S. 581 (1989), discussed *infra*. Indeed, the lower court's interpretation of *Ridgway* is contrary to the holdings of this Court in *Free v. Bland*, 363 U.S. 663 (1962), and *Wissner v. Wissner*, 338 U.S. 655 (1950), that federal treasury regulations and statutes prevail over conflicting Texas and California community property laws pursuant to the Supremacy Clause.

manner of presentment of claims for government pensions, was challenged as an unconstitutional interference with the right to contract. The pension in question was a Civil War military pension. In holding the statute to be valid, this Court held:

> The pension granted by the government is a matter of bounty. "No pensioner has a vested legal right to his pension.
>
> * * *
>
> Congress, being at liberty to give or withhold pensions, may prescribe who shall receive, and determine all the circumstances and conditions under which any application therefor shall be prosecuted.
>
> * * *
>
> The whole control of that matter is within the domain of congressional power.

Id., 157 U.S. at 166.

In *Lynch v. U.S., supra*, this Court had before it a case involving claims to war risk insurance policies, issued during World War II. In distinguishing between such policies and military pensions, this Court stated:

> Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right The benefits conferred

> by gratuities may be redistributed or withdrawn at any time in the discretion of Congress.

Id., 292 U.S. at 576-577.

The opinion of the court below conflicts with this Court's opinions holding generally that the beneficiaries of government pensions do not acquire rights that are not subject to power the legislative body to amend, or alter, with respect to payments that have not become due. *Flemming v. Nestor*, 363 U.S. 603, 610-11 (1960) (Social Security benefits); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979) (Railroad Retirement Benefits).

In its attempt to rely upon the effect of the state doctrine of res judicata, the court below has misinterpreted footnote 5 of *Mansell v. Mansell*, 490 U.S. 581 (1989), as a statement by this Court that it has ". . . no jurisdiction to decide whether the doctrine of res judicata should have barred the reopening of pre-*McCarty* settlements since that was a matter of *state* law." *See* 894 S.W.2d at 117 (A-9).

Mansell did not deal with the 1990 amendment, enacted to suspend state partition judgments of military retired pay issued after pre-*McCarty* divorces, and cannot be read to apply to the 1990 amendment. The 1983 version of the statute at issue in *Mansell* did not have any provision mandating retroactive application of its provisions, or requiring suspension of existing judgments. There was, accordingly, no automatic effect upon any existing final state court judgment unless, by some procedure under state law, the judgment could be reopened to consider the application of the federal statute. *Mansell* correctly observed in the

footnote, that unless the state court reopened a case already decided, which would depend upon that state's application of its rule of res judicata, then the application of the 1983 version of USFSPA to the division of benefits, previously made in such case, could not have come before the California court, and therefore, could not be considered as grounds for error by this Court. Footnote 5 of *Mansell* is only a restatement of the rule of appellate practice that an appellate court cannot consider points of error not raised in the lower court; it is not a statement that the state law doctrine of res judicata can nullify Congress' 1990 amendment, as the lower court's opinion holds. The lower court simply misinterpreted footnote 5 of *Mansell* to enable it to reach its desired result.

The holding of the court below is in direct conflict with the application of the 1990 Amendment made by the California courts, and will result in the citizens of these two community property states receiving different treatment under the federal statute. *In Re Marriage of Curtis*, 9 Cal.Rptr.2d 145 (Cal.App. 1 Dist. 1992, review denied) and *In re Marriage of Olson*, 30 Cal.Rptr.2d 306 (Cal.App. 2 Dist. 1994, review denied), have both dealt with the effect of the 1990 amendment on existing state judgments that made a later division of military retired pay where there had been a pre-McCarty divorce decree that did not mention such benefits.

In *In re Marriage of Curtis* the California court in, discussing the effect of the Amendment stated:

> In summary, we find that the 1990 amendments to FUSFSPA refer to orders or judgments reopening pre-McCarty

> dissolutions, whether those orders or judgments were issued "before, on or after" November 5, 1990. After November 5, 1990, state courts may not reopen pre-McCarty dissolutions; they lack subject matter jurisdiction to do so. An order to reopen which was issued prior to November 5, 1990, is given limited effect. To the extent that the order provided that a portion of military retirement benefits be made to the non-military spouse as they become payable to the military spouse, that order will be given effect up to November 5, 1992. No payment of future retirement benefits will be made pursuant to such an order after November 5, 1992.
>
> * * *
>
> Virginia Curtis...will not be entitled to receive any percentage of John Curtis's benefits as become payable to him after November 5, 1992.

Id., 9 Cal.Rptr.2d at 154-55.

In *In re Marriage of Olson, supra*, another district of the California Court of Appeal applied the 1990 amendment to invalidate an existing post-divorce division of military retired pay, where there had been a pre-*McCarty* divorce decree that did not mention such benefits, stating:

> . . . George has benefited by Congress' recognition that his military benefits,

> unmentioned and undivided in the 1974 final judgment of dissolution, are now totally his. The 1990 amendment to [10 U.S.C. § 1408 (c) (1)] retroactively deprived Mary of the benefits the court granted her in 1989.

Id., 30 Cal. Rptr. 2d at 309.

CONCLUSION

The Texas Court of Appeals has turned the Supremacy Clause of the U.S. Constitution on its head by holding that the res judicata effect of a state court judgment prevails over conflicting federal law. If the lower court's opinion stands, Texas will become the only state which has held that state law (the res judicata effect of a state court judgment) prevails over a conflicting federal statute, dealing with matters solely within the constitutional control of Congress under Article I, § 8. The opinion below frustrates the express legislative intent of the United States Congress in its passage of the 1990 amendment to 10 U.S.C. § 1408 (c) (1), which it clearly intended to suspend the 1983 partition judgment involved in this case, along with the many other such orders in Texas, California, and the other states of the Union. The res judicata effect of a state court judgment is only a form of state law. Texas' community property law, and its doctrine of res judicata must give way to the specific provisions of the 1990 amendment to 10 U.S.C. § 1408 (c) (1), and the Supremacy Clause. The Texas Court's refusal to recognize the federal law represents a serious challenge to Congress' right to formulate and implement its policy in this important area.

For the foregoing reasons, Petitioner requests that the

petition for writ of certiorari be granted and this case set for consideration with briefs on the merits and oral argument, and that this Court reverse the judgment of the Texas Court of Appeals, Third District, at Austin, and affirm the judgment of the trial court (A-21).

Respectfully submitted,

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APPENDIX

TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN

No. 03-93-00607-CV

Emma J. Trahan, Appellant

v.

Jack F. Trahan, Appellee

From the District Court of Travis County,
200th Judicial District
No. 344,539,
Honorable F. Scott McCown, Judge Presiding

Jack F. Trahan sued Emma Trahan, his former wife, for declaratory judgment that a 1983 final judgment, partitioning between them Jack's right to military retired pay, had become invalid and unenforceable because of a subsequent, retroactive amendment to the Uniformed Services Former Spouses' Protection Act, 10 U.S.C.A. § 1408(c)(1) (West 1983 & Supp. 1994). The trial court awarded him declaratory relief to that effect. Emma appeals. We will reverse the trial-court judgment and render judgment that the 1983 judgment is a final, valid, subsisting, and enforceable judgment.

THE CONTROVERSY

Emma and Jack were married from September 1943

until their first divorce on January 22, 1963. They remarried on October 28, 1970, and were again divorced on May 7, 1971. Neither divorce decree disposed of Jack's right to military retired pay. On February 14, 1977, Emma filed a partition action in which the district court concluded that 77.92% of Jack's right to retired pay was community property which should have been divided at divorce. The court partitioned the right to retired pay. This trial court judgment was affirmed in part and modified in part in *Trahan v. Trahan*, 609 S.W.2d 820 (Tex. Civ. App. -- Texarkana 1980), *rev'd*, 626 S.W.2d 485 (Tex. 1981). Jack filed an application for writ of error to the Supreme Court of Texas. While the application was pending, the United States Supreme Court decided the case of *McCarty v. McCarty*, 453 U.S. 210 (1981), which held that federal law precluded a state court's partition of military non-disability retired pay pursuant to state community property laws. Following *McCarty*, the Texas Supreme Court reversed the judgment of the court of appeals and rendered judgment for Jack. *Trahan v. Trahan*, 626 S.W.2d 485 (Tex. 1981).

On September 8, 1982, Congress enacted 10 U.S.C.A. § 1408, the Uniformed Services Former Spouses' Protection Act ("USFSPA"). The statute effectively nullified the *McCarty* decision and allowed states to apply their own community property laws as they had done before *McCarty*.[1]

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[1] As enacted in 1983, § 1408(c)(1) of the USFSPA provided:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981 [date of the

On February 10, 1983, Emma again filed a suit to partition Jack's pension benefits. The 200th District Court of Travis County, in cause number 344,539, awarded Emma 38.96% of Jack's retired pay from June 25, 1981. This judgment was appealed and affirmed in *Trahan v. Trahan*, 682 S.W.2d 332 (Tex. App. -- Austin 1984, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1002 (1986) (appeal dismissed for want of a substantial federal question).

On November 5, 1990 Congress amended the USFSPA ("1990 amendment"), resulting in the instant dispute. The portion of the amendment in controversy reads as follows:

> (c)(1). . . A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay

---

> *McCarty* decision], either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C.A. § 1408(c)(1) (effective Feb. 1, 1983).

> of the member as property of the member and the member's spouse or former spouse.

10 U.S.C.A. § 1408(c)(1) (West Supp. 1994). The effective date section of the 1990 amendment states:

> The amendment made by subsection (a) [amending subsection (c)(1) of section 1408] shall apply with respect to judgments issued before, on, or after the date of the enactment of this Act [Nov. 5, 1990]. In the case of a judgment issued before the date of the enactment of this Act, such amendment shall not relieve any obligation otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act [Nov. 5, 1990].

Publ. L. No. 101-510, § 555(e), 104 Stat. 1569, 1570 (1990), *amended by* Pub. L. No. 102-190, § 1062(a)(1), 105 Stat. 1475 (1991).

Based on the 1990 amendment, the trial court nullified the 1983 judgment affirming the partition of Jack's military retirement benefits and enjoined any payments after November 5, 1992. Emma brings four points of error.

HOLDINGS AND DISCUSSION

In her first two points of error, Emma complains (1) the trial court erred in failing to hold that res judicata barred reopening the 1983 judgment regardless of the 1990 amendment, and (2) the trial court's retroactive application

of the 1990 amendment to a valid judgment of a Texas court is unconstitutional under the due process clause of the United States Constitution. In essence, Emma argues she obtained a vested property right under the 1983 partition judgment, which right could not later be confiscated without compensation. Jack responds by citing the congressional intent behind enactment of the 1990 amendment and concludes that res judicata and the prohibition against retrospective laws do not apply in this case because a service member's right to military retired pay never vests.

Congressional Intent

Despite several decisions to the contrary,[2] it is now

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[2] Cases permitting retroactive application include: *Trahan v. Trahan*, 682 S.W.2d 332 (Tex. App. -- Austin 1984, writ ref'd n.r.e.) (res judicata only applies to legislation then existing), *cert. denied*, 475 U.S. 1002 (1986) (dismissed for want of a substantial federal question) (citing *State v. Powell*, 134 S.W. 746 (Tex. Civ. App. 1910, writ ref'd)); *Powell v. Powell*, 703 S.W.2d 434 (Tex. App. -- Waco 1985, writ ref'd n.r.e.) (enactment of USFSPA created a change in law and suit not barred by res judicata), *cert. dism'd*, 476 U.S. 1180 (1986) (dismissed for want of a substantial federal question). *See also Marino v. State Farm Fire & Cas. Ins. Co.*, 787 S.W.2d 948, 950 (Tex. 1990) ("[R]es judicata is not a defense in a subsequent action if there has been a change in the material facts, the applicable statutory law, or the decisional law between the first judgment and the second suit."). However, these cases did not reflect the majority view. *See Segrest v. Segrest*, 649 S.W.2d 610 (Tex. 1983) (*McCarty* decision did not require retroactive application to divorce decrees finalized before

apparent that the original USFSPA, as enacted in 1982,[3] was not intended to apply retroactively. *See* John B. McKnight, *Closing the McCarty-USFSPA Window: A Proposal for Relief from McCarty-Era Final Judgments*, 63 Tex. L. Rev. 497, 512 (1984).[4] In first enacting the USFSPA, Congress did not intend for courts to allow the reopening of divorce cases that had become final before the *McCarty* decision. *Redus v. Redus*, 852 S.W.2d 94, 96 (Tex. App. -- Austin 1993, writ denied). The legislative history reveals:

> The committee is concerned because some state courts have been less than faithful in their adherence to the spirit of the law

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decision), *cert. denied*, 464 U.S. 894 (1983); *Breen v. Breen*, 693 S.W.2d 495 (Tex. App. -- San Antonio 1985, writ ref'd n.r.e.) (res judicata applied to bar collateral attack after *McCarty* decision, but before USFSPA); *Allison v. Allison*, 690 S.W.2d 340 (Tex. App. -- Fort Worth 1985) (USFSPA was permissive and res judicata barred subsequent reopening of litigation), writ ref'd n.r.e., 700 S.W.2d 914 (Tex. 1985).

[3] The USFSPA was enacted on September 8, 1982 and became effective on February 1, 1983.

[4] McKnight cites portions of the Conference Committee Report for the proposition that the USFSPA was not intended to re-open final adjudication of divorce decrees. "[T]he courts should not favorably consider applications based on the enactment of this title to reopen cases finalized before the *McCarty* decision wherein military retired pay was not divided." H.R. Rep. No. 749, 97th Cong., 2d Sess. 165, *reprinted in* 1982 U.S.C.C.A.N. 1569.

> [USFSPA]. The reopening of divorce cases finalized before the Supreme Court's decision in *McCarty v. McCarty* that did not divide retired pay continues to be a significant problem. Years after final divorce decrees have been issued, some state courts . . . have reopened cases (through partition actions or otherwise) to award a share of retired pay. Although Congress has twice stated in report language that this result was not intended, the practice continues unabated. Such action is inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate.

H.R. Rep. No. 665, 101st Cong., 2d Sess. 279, *reprinted in* 1990 U.S.C.C.A.N. 2931, 3005.

The legislative intent behind the original enactment of the USFSPA and cases examining the doctrine of res judicata as it applied to the 1983 version of the USFSPA, however, are not dispositive of whether the express statutory language in the 1990 amendment, giving rise to retroactive application, displaces the doctrine of res judicata. Before the 1990 amendment, the USFSPA did not contain any language mandating retroactive application.

In enacting the 1990 amendment, the intent of Congress to cure an unintended interpretation of the USFSPA by the courts is abundantly clear. "The amendment . . . *shall* apply . . . to judgments issued *before*, on, or after the date of the enactment of this Act." Publ. L. No. 101-510, § 555(e), 104 Stat. 1569, 1570 (1990), *amended by* Pub. L. No. 102-190, § 1062(a)(1), 105 Stat. 1475 (1991) (emphasis

added). The last sentence of the effective date paragraph is also inescapably retroactive and mandatory. "[J]udgment[s] issued *before the date of the enactment . . . shall not* relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act." *Id.* (emphasis added). The intent evident in this paragraph is that section 1408(c)(1) applies to final judgments issued before the 1990 USFSPA amendment and suspends any further payment to be made pursuant to a final judgment after November 5, 1992, two years after the enactment of the amendment.

Furthermore, the Code of Federal Regulations reinforces the assertion that the amendment was intended to affect valid court judgments.

> A modification on or after June 26, 1981, of a court order that *originally* awarded a division of retired pay as property before June 26, 1981, may be honored for subsequent court-ordered changes made for clarification, such as the interpretation of a computation formula in the original court order. For court orders issued before June 26, 1981, subsequent amendments after that date to provide for a division of retired pay as property are *unenforceable* . . . .

32 C.F.R. § 63.6(c)(7) (1993) (emphasis added).

Res Judicata

We must now determine whether the amendment to

the USFSPA preempts application of the Texas common law doctrine of res judicata. The supremacy clause of the U.S. Constitution orders that a congressional enactment preempts all inconsistent state legislation if conflicts exist between state and federal law. U.S. Const. art. VI, cl. 2. *See generally*, Richard P. Shafer, *Federal Pre-emption of State Authority Over Domestic Relations-Federal Cases*, 70 L.Ed. 2d 895, 897 (1983). The field of domestic relations is generally a matter of state law, and the United States Supreme Court has consistently recognized that when Congress passes general legislation, it rarely intends to displace state law in that particular area. *Mansell v. Mansell*, 490 U.S. 581 (1989) (citing *Rose v. Rose*, 481 U.S. 619, 628 (1987) and *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)). Federal law will only preempt state law in the area of domestic relations "where enforcement of state law will cause major damage to clear and substantial federal interests." Shafer, *supra*, at 897.

Whether federal law preempts state community property laws is quite a different question from whether the USFSPA preempts the common law doctrine of res judicata. The Supreme Court in *Mansell*, after examining the legislative intent of the USFSPA and the precise language of the Act, addressed the issue of federal preemption of state community property laws while noting expressly that it had no jurisdiction to decide whether the doctrine of res judicata should have barred the reopening of pre-*McCarty* settlements since that was a matter of *state* law. *Mansell*, 490 U.S. at 586 n.5. The Supreme Court of Texas, in *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990), followed the *Mansell* opinion. In *Berry*, the court reversed a court of appeals decision that retroactively applied a federal law, rendering a Texas divorce decree unenforceable. The subsequent enactment of the

USFSPA cannot be used to attack collaterally a final divorce decree. *Berry*, 786 S.W.2d at 673. If the court rendering the partition judgment had jurisdiction over the parties and the subject matter of the suit, the court's judgment is not void, but only voidable. A final divorce decree thus may not be collaterally attacked even if it is later found to be erroneous or voidable. *Id.*; *Humble Oil & Refining Co. v. Fisher*, 253 S.W.2d 656, 661 (Tex. 1952); *see also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). If a final judgment is voidable as opposed to void, the doctrine of res judicata applies. *Segrest*, 649 S.W.2d at 613 (Tex. 1983).

There are instances where, under the supremacy clause, a *state divorce decree* must give way to clearly conflicting federal enactments. *See Ridgway v. Ridgway*, 454 U.S. 46 (1981). In *Ridgway*, the court found that provisions of the Servicemen's Group Life Insurance Act of 1965, giving an insured service member the right to freely designate and alter the beneficiaries named under the contract, prevail over and displace a constructive trust for the benefit of the service member's children imposed upon the policy proceeds by a state-court divorce decree. *Id.* at 54-60. However, the court clearly distinguished the *Ridgway* situation, where the service member possessed an absolute individual right to designate the policy beneficiary, from the situation in which community property was at stake. In *Ridgway*, the service member would not have been able to "impose[] his will upon property in which his wife had a distinct vested community property interest." *Id.* at 59-60.

Few Texas cases specifically address the retroactive effect of the 1990 amendment and the doctrine of res judicata. *See Sutherland v. Cobern*, 843 S.W.2d 127 (Tex.

App. -- Texarkana 1992, writ denied); *Knowles v. Knowles*, 811 S.W.2d 709 (Tex. App. -- Tyler 1991, no writ). In *Sutherland*, the court addressed the issue of whether the 1990 amendment barred a subsequent reopening of litigation. In that case, the court determined that since the original pre-*McCarty* divorce decree classified the serviceman's retired pay as a divisible community asset, the USFSPA, as amended, did not preclude a post-USFSPA partition suit. *Sutherland*, 843 S.W.2d at 130. The court never addressed the issue of res judicata, however, because the court concluded that the service member was estopped from asserting the issue. In *Knowles*, the court affirmed a trial-court judgment denying the partition of military retired pay that had already been disposed of in a final divorce decree. *Knowles*, 811 S.W.2d at 716 [sic]. The application of the 1990 amendment, however, was wholly consistent with the doctrine of res judicata.

Vested Rights

Whether the doctrine of res judicata controls is dependent on whether Emma had a vested right[5] in the retired pay pursuant to the partition action.

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[5] Courts often manipulate the concept of "vested rights." Some legal scholars describe the term "vested right" as little more than a conclusion and assert that vested rights are only those rights which the court decides should be protected. *See* Bryant Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231 (1927); Bryant Smith, *Retroactive Laws and Vested Rights II*, 6 Tex. L. Rev. 409 (1928); George D. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 62 (1977).

The Texas constitution prohibits retroactive laws.[6] Tex. Const. art. I, § 16. A statute is retroactive, and thus prohibited, if it impairs vested rights acquired under existing laws. *International Sec. Life Ins. Co. v. Maas*, 458 S.W.2d 484, 490 (Tex. Civ. App. -- Houston [1st Dist.] 1970, writ ref'd n.r.e.). Generally, retroactive laws are regarded with disfavor. *Deacon v. City of Euless*, 405 S.W.2d 59, 61 (Tex. 1966). A statute is presumed to be prospective unless it is clear from a fair reading of the statute that the legislature intended it to apply to both past and present controversies. *Ex parte Abell*, 613 S.W.2d 255, 258 (Tex. 1981); *Coastal Indust. Water Auth. v. Trinity Portland Cement Div., Gen. Portland Cement Co.*, 563 S.W.2d 916, 918 (Tex. 1978); *State v. Humble Oil & Ref. Co.*, 169 S.W.2d 707 (Tex. 1943).

Private rights of parties which become vested under a judgment cannot be taken away without compensation by a subsequent legislative act. *Inman v. Railroad Comm'n*, 478 S.W.2d 124, 128 (Tex. Civ. App. -- Austin 1972, writ ref'd n.r.e.); *Jenckes v. Mercantile Nat'l Bank*, 40[illegible] S.W.2d 260 (Tex. Civ. App. -- Dallas 1966, writ ref'd n.r.e.). A final judgment settles all rights adjudicated between the parties and the substantive rights vindicated therein are vested rights. *Arnold v. City of Sherman*, 244 S.W.2d 880, 883

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[6] Article I, section 16 of the Texas constitution provides: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Only three states have unqualified constitutional provisions prohibiting retroactive legislation: Colorado, Tennessee, and Texas. Norman J. Singer, *Statutes and Statutory Construction* § 41.12 n. 7 (5th ed. 1992).

(Tex. Civ. App. -- Dallas 1951, writ ref'd).

Jack cites *Brannon v. Randmaa*, 736 S.W.2d 175 (Tex. App. -- Austin 1987, writ denied), *cert. denied*, 486 U.S. 1019 (1988), for the proposition that because military retirement pensions are gratuities allocated by Congress and can be altered by Congress, a service member's right to retired pay never vests. Therefore, if Jack does not have a vested right in his military retired pay, a fortiori, Emma cannot possess a vested right to any part of such pay. The *Brannon* decision is distinguishable from the present cause because in *Brannon* there was no final judgment involving a division of military retired pay. The service member in *Brannon*, who was divorced in 1977, argued that he had a vested right in his retired pay pursuant to the 1981 *McCarty* decision, which right could not be taken away by the subsequent federal enactment of the USFSPA. *Id.* at 176. The service member's right to retired pay was not adjudicated in his favor. He had attempted to freeze the law at the particular time the law favored him. The court determined that the service member "never acquired a vested, *permanent* right to *sole* enjoyment of his retirement benefits before Congress enacted the USFSPA." *Id.* at 178 (emphasis added).

The court further stated: "It is true that the effect of the opinion in *McCarty* was to declare [sic] the benefits to be solely [the service member's], but the Supreme Court just as certainly could not vest in [the service member] *for all time* the uninterrupted right to those benefits." *Id.* at 178. Rather obviously, the *Brannon* court used the word "vested" in the sense that the court was powerless to give the right a permanence that Congress had not given it. In addition, the *Brannon* court reaffirmed that military retired pay is subject

to division upon divorce as a vested community property right even if the present right to the pay had not fully matured. *Id.* at 177 (citing *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976)); *see also Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1977).

CONCLUSION

The 1983 trial-court judgment, affirmed by this court in 1984, awarded Emma the legal right to 38.96 percent of Jack's right to retired pay from September 30. With our decision in that case, her right vested. Res judicata barred re-opening the issue of whether she possessed such a right. Any subsequent amendment of USFSPA did not destroy that right. We hold accordingly and conclude that the trial court erred in its declaratory judgment. We therefore sustain Emma's first two points of error, reverse the trial-court judgment, and render judgment that the 1983 judgment of the 200th District Court of Travis county, Texas, in cause number 344,539, styled Emma J. Trahan vs. Jack F. Trahan, is a valid, subsisting and enforceable judgment.

Owing to our holdings and orders above, we need not reach Emma's third and fourth points of error.

/s/
John Powers, Justice

Before Justice Powers, Jones and B.A. Smith
Reversed and Rendered
Filed: March 8, 1995
Publish

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS, AT AUSTIN

JUDGMENT RENDERED MARCH 8, 1995

NO. 03-93-00607-CV

Emma J. Trahan v. Jack F. Trahan
Appeal from 200th District Court of Travis County
Before Justices Powers, Jones and B. A. Smith
Reversed and Rendered -- Opinion by Justice Powers

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court is reversed, and judgment is rendered that the 1983 judgment of the 200th District Court of Travis County in cause number 344,539, *Emma J. Trahan v. Jack F. Trahan* is a final, valid, subsisting, and enforceable judgment. It is FURTHER ordered that the appellee pay all costs relating to this appeal both in this Court and the court below; and that this decision be certified below for observance.

Points of Error presented by Emma Trahan (appellant) to the Texas Court of Appeal, Third District, in the case at bar on appeal from the trial court's judgment

POINTS OF ERROR

POINT OF ERROR NO. ONE

The Trial Court erred in failing to hold that Former Spouses' right under the 1983 Judgment is res judicata, regardless of the provisions of the 1990 Amendment.

POINT OF ERROR NO. TWO

The Trial Court's application of the 1990 Amendment to a valid judgment of a Texas Court is unconstitutional under the Due Process Clause of the United States Constitution

POINT OF ERROR NO. THREE

The Trial Court erred in construing the 1983 Judgment as a "proceeding" within the meaning of the 1990 Amendment.

POINT OF ERROR NO. FOUR

The Trial Court erred in construing that the 1983 Judgment "did not treat (or reserve jurisdiction to treat) any amount of retired pay of the Member as property of the Member and the Member Spouse or Former Spouse."

Points of Error presented by Jack Trahan (appellee) to the Texas Court of Appeal, Third District, in the case at bar from the motion for rehearing in that Court

POINTS OF ERROR

1. The Court of Appeals erred in failing to apply the controlling law set forth in the second paragraph of Article VI of the United States Constitution [the Supremacy Clause].

2. The Court of Appeals erred in holding that the trial court's application of the 1990 amendment to the 1983 judgment is unconstitutional under the due process clause of the United States Constitution.

3. The Court of Appeals erred in denying the effect of the 1990 amendment, which changed the applicable law and created an altered situation not subject to the state doctrine of res judicata.

OFFICIAL NOTICE FROM COURT OF APPEALS
THIRD DISTRICT OF TEXAS

Date: April 5, 1995
Re: Case No. 03-93-00607-CV
Style: Emma J. Trahan v. Jack F. Trahan

The appellee's motion for rehearing was overruled by this Court on the date noted above.

T. C. Case # 344,539 W. Kenneth Law, Clerk

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

August 1, 1995

Mr. William R. Travis
Mr. Gregory Don Sherwood
823 Congress Ave., Ste. 707
Austin, TX 78701

Mr. Phillip C. Friday, Jr.
700 San Antonio
Austin, TX 78701

RE: Case Number 95-0465
Style: JACK F. TRAHAN
v.
EMMA J. TRAHAN

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/
Michael C. Murphey, Deputy Clerk

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

October 27, 1995

Mr. William R. Travis
Mr. Gregory Don Sherwood
823 Congress Ave., Ste. 707
Austin, TX 78701

Mr. Phillip C. Friday, Jr.
700 San Antonio
Austin, TX 78701

RE: Case Number 95-0465
Style: JACK F. TRAHAN
v.
EMMA J. TRAHAN

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/
Michael C. Murphey, Deputy Clerk

CAUSE NO. 344,539

JACK F. TRAHAN	§	IN THE DISTRICT
	§	COURT OF
V.	§	OF TRAVIS COUNTY,
	§	TEXAS, 200TH
EMMA J. TRAHAN	§	JUDICIAL DISTRICT

FINAL JUDGEMENT

On the 26th day of May, 1993 there came on to be heard the above-styled and numbered cause. The Plaintiff, Jack F. Trahan, appeared in person and by his attorney of record, William R. Travis, and announced ready for trial.

The Court, having read the pleadings, stipulations, and trial briefs of counsel, and having heard the argument of counsel, finds that it has jurisdiction of the parties and subject matter of this cause and that all parties entitled to notice have entered their appearance herein.

The Court finds that Plaintiff seeks a declaratory judgment that a prior judgment of the 200th District Court of Travis County, Texas has become invalid because of changes in the federal statute upon which the judgment was based, and an injunction restraining the enforcement of said judgment. The said judgment awarded Defendant 38.96% of Plaintiff's payments of his Air Force disposable retired pay together with any cost-of-living increases and required Plaintiff to instruct the United States Air Force through its Accounting and Finance Center, Denver, Colorado, that beginning on September 30, 1983, there be paid to Defendant, a sum in dollars equal to 38.96% of Plaintiff's monthly disposable retired pay, each month, together with

any cost-of-living increases. The judgment further provided that in the event Plaintiff failed or refused to instruct the United States Air Force as required, Plaintiff himself must pay to Defendant the sum in dollars equal to 38.96% of his monthly disposable retired pay, each month, together with any cost-of-living increases, beginning September 30, 1983. The Court further finds that Plaintiff has ceased paying to Defendant the said percentage of his military retired pay as ordered by the judgement and that such cessation occurred after the last payment due prior to November 5, 1992.

The Court further finds that Defendant has filed a general denial to the allegations in Plaintiff's petition and amotion to hold Plaintiff in contempt for his failure to make the payments required by the prior judgment after the last payment due prior to November 5, 1992.

The Court finds that the Plaintiff should prevail in his action for declaratory judgment and for injunction and that Defendant's motion for contempt should be denied. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the provisions of the Corrected Final Judgment of the 200th District Court of Travis County, Texas in Cause No. 344,539, styled Emma J. Trahan vs. Jack F. Trahan, are no longer valid with respect to the partition and division of installments of Jack F. Trahan's military retired pay that are, or have been paid after November 5, 1992 and that the enforcement of said provisions with respect to said installments of pay are hereby enjoined. IT IS FURTHER ORDERED that Emma J. Trahan take nothing by her suit and that her motion for contempt is denied.

All costs of Court are taxed to the party incurring same. All other relief not expressly granted in this judgment

is denied.

SIGNED this 8th day of July, 1993.

/s/
F. Scott McCowan[sic],
Judge Presiding

APPROVED AS TO FORM:

WEIR, APPELL & TRAVIS
101 East 9th Street
Suite 707
Austin, Texas 78701
(512) 329-0039
Fax: (512) 469-0404

By: /s/
William R. Travis
State Bar No. 20195000
ATTORNEYS FOR PLAINTIFF

PHILLIP C. FRIDAY, JR.
700 San Antonio Street
Austin, Texas 78701
(512) 472-9291
Fax: (512) 472-9302
State Bar No. 07458000

ATTORNEY FOR DEFENDANT

CAUSE NO. 93-00594

JACK F. TRAHAN	§	IN THE DISTRICT
	§	COURT OF
V.	§	OF TRAVIS COUNTY,
	§	TEXAS, 250TH
EMMA J. TRAHAN	§	JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION FOR INJUNCTION AND DECLARATORY RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Jack Trahan, Plaintiff, complaining of Emma Trahan, defendant, and for cause of action would show the Court as follows:

I.

Plaintiff is an individual residing in Travis County, Texas. Defendant is an individual residing in Wood County, Texas. No service of process upon Defendant is necessary at this time. The Judgment which Plaintiff seeks to stay was rendered by the 200th Judicial District Court of Travis County, Texas, in Cause No. 344,539. Venue of this suit is mandatory in Travis County, Texas pursuant to Section 65.023 of the Texas Civil Practice and Remedies Code.

II.

Plaintiff and Defendant have been twice married and were twice divorced, the first time on January 22, 1963, and the second time on May 7, 1971. The first marriage had included 187 months of the 240 months that Plaintiff had

served as an active member of the United States Air Force. Plaintiff retired from the Air Force on April 30, 1965 and began receiving retired pay. Neither of the divorce decrees treated any amount of Plaintiff's military retired pay as property of the Plaintiff and the Defendant.

III.

On November 15, 1983, in a partition action instituted by Defendant, the 200th District Court of Travis County, Texas, in the said Cause No. 344,539, entered its Corrected Final Judgment partitioning both the accrued and future installments of Plaintiff's Air Force disposable retired pay. Plaintiff was required to pay to Defendant 38.96% of all future installments of Plaintiff's monthly disposable retired pay for so long as Plaintiff is entitled to receive such pay. The Judgment also required Plaintiff to pay the additional sum of $275.00 per month from future installments of his disposable retired pay until Defendant had been paid the total sum of $13,885.05 in recognition of the accrued payments Plaintiff had received prior to the Judgment. Plaintiff was further ordered to instruct the Air Force Accounting and Finance Center to pay directly to Defendant both the 38.96% of Plaintiff's future monthly installments of disposable retired pay, together with the same percentage of any future cost-of-living increases, and the $275.00 per month.

IV.

The partition judgment of the District Court, referred to above, was rendered under the authority of the Uniformed Services Former Spouses' Protection Act, hereinafter called the USFSPA, 10 U.S.C.A. § 1408(c)(1), which then

permitted the Texas courts to treat such pay as property of the service member and his spouse in accordance with the law of the jurisdiction.

V.

The judgment of the District Court although valid when is [sic] was rendered is no longer valid and its enforcement is now directly contrary to the USFSPA. On November 5, 1990 10 U.S.C.A. § 1408(c)(1) was amended, effective November 5, 1992, to require that "A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation . . . affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.["]

VI.

The judgment of the 200th District court in Cause No. 344,539 adjudicated the rights of the parties to Plaintiff's military retired pay under the legislation then existing. The United States Congress has plenary power to deal with military retired pay and may modify the rights conferred by the applicable statutes. Under the present statutory provisions the judgment awarding Defendant a percentage of future installments of Plaintiff's military retired pay is invalid as to all installments paid after November 5, 1992 and its enforcement should be enjoined.

VII.

Plaintiff requests that the Court declare that the amendment of the USFSPA has modified the rights of the parties previously determined by the 200th District Court and, with respect to all installments of Plaintiff's military retired pay paid after November 5, 1992, that the judgment of said court has been nullified.

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that the enforcement of the judgment of the 200th District Court of Travis County, Texas in Cause No. 344,539, styled Emma J. Trahan v. Jack F. Trahan, be permanently enjoined in conformity with the foregoing pleadings and that this Court declare that the amendment of the USFSPA described has nullified the provisions of said judgment pertaining to all installments of Plaintiff's military retired pay paid after November 5, 1992. Plaintiff further prays for attorney's fees, costs of suit, and such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted this 15th day of January 1993.

WEIR, APPELL & TRAVIS
101 East 9th Street, Suite 707
Austin, Texas 78701
(512) 469-0039
(512) 469-0404 (FAX)

By: /s/
William R. Travis
State Bar No. 20195000
ATTORNEYS FOR
PLAINTIFF

CAUSE NO. 93-00954 [sic]

JACK F. TRAHAN	§	IN THE DISTRICT
	§	COURT OF
V.	§	OF TRAVIS COUNTY,
	§	TEXAS, 250TH
EMMA J. TRAHAN	§	JUDICIAL DISTRICT

DEFENDANT'S ORIGINAL ANSWER

EMMA J. TRAHAN, Defendant, files this her Original Answer to the Original Petition for Injunction and Declaratory Relief filed by JACK F. TRAHAN, Plaintiff, as follows:

1. Res Judicata

The Corrected Final Judgment heretofore signed in Cause No. 344,539, styled "Emma J. Trahan vs. Jack F. Trahan," in the 200th District Court of Travis County, Texas, constitutes res judicata of the claims raised by Plaintiff herein, and bars this suit.

2. General Denial

Defendant denies each and every allegation contained in Plaintiff's Original Petition and demands strict proof thereof.

3. Attorney's Fees

Becoming Counter-Plaintiff herein, EMMA J. TRAHAN requests the Court to award her reasonable attorney's fees incurred in defending this action.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that Plaintiff take nothing by his suit, and that all costs of Court be charged against him.

PHILIP C. FRIDAY, JR.
700 San Antonio Street
Austin, Texas 78701
512/472-9291
512/472-9302 (fax)
State Bar No. 07458000

/s/
Attorney for Emma J. Trahan

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's [sic] Original Answer was mailed by U.S. Mail, postage prepaid, to William R. Travis, Attorney for Defendant [sic], at WEIR, APPELL & TRAVIS, 101 East 9th [S]treet, Suite 707, Austin, TExas [sic] 78701, on this the 24th day of February 1993.

NO. 344,539

JACK F. TRAHAN	§	IN THE DISTRICT
	§	COURT OF
V.	§	OF TRAVIS COUNTY,
	§	TEXAS, 200TH
EMMA J. TRAHAN	§	JUDICIAL DISTRICT

PLAINTIFF'S FIRST AMENDED MOTION FOR CONTEMPT

EMMA J. TRAHAN, Plaintiff, moves the Court to hold JACK F. TRAHAN, Defendant, in contempt of court, upon the following grounds:

1. Court Order

By terms of the Corrected Final Judgment rendered in this cause on November 15, 1983, Defendant was ordered to do the following:

> It is further ORDERED, ADJUDGED AND decreed that Plaintiff, EMMA J. TRAHAN, do have and recover from Defendant, JACK F. TRAHAN, 38.96% of all future payments of his Air Force disposable retired pay, including any cost-of-living increases which may be conferred under applicable law; together with interest on any amount not paid over to Plaintiff within thirty (30) days of receipt by Defendant, at the statutory rate.
>
> The Court further finds that Defendant is a constructive trustee, for the use and benefit of Plaintiff, with respect to said Air Force disposable

retired pay. To effectuate the foregoing Judgment, it is further ORDERED, ADJUDGED and DECREED that Defendant shall instruct the Air Force Accounting and Finance Center, Denver, Colorado, to pay to Plaintiff, at her residence, from Defendant's account, a sum in dollars equal to 38.96% of Defendant's monthly disposable retired pay together with any cost-of-living increases added thereto, commencing on September 30, 1983, and continuing on the last day of each month thereafter so long as Defendant is entitled to receive his disposable retired pay.

* * *

In the event Defendant should fail or refuse to instruct the United States Air Force as required above, or in the event the United States Air Force should fail or refuse to pay Plaintiff as required above, it is further ORDERED, ADJUDGED and DECREED that Defendant shall pay unto Plaintiff a sum in dollars equal to 38.96% of his monthly disposable retired pay, together with any cost-of-living increases added thereto, beginning on September 30, 1983, and continuing on the last day of each month thereafter, so long as Defendant is entitled to receive such pay. . . . It is further ORDERED, ADJUDGED and DECREED that Defendant shall make such payments into the Registry of this Court, hereby designated as the Domestic Relations Office, Travis County Courthouse, Austin, Texas, who shall thereafter promptly remit such payments to Plaintiff.

2. Willful disobedience of Court Order

Contrary to the clear and unambiguous directives of said judgment, Defendant has willfully and intentionally failed and refused to pay over to Plaintiff, or to cause to be paid over to Plaintiff by an allotment, any of the amounts due to her since December 1, 1992.

3. Attorney's Fees

Plaintiff is entitled to recover her reasonable attorney's fees.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon hearing, Defendant be held in contempt of court, and that he be punished by fine and by confinement in the Travis County Jail until he shall have purged himself of contempt. Plaintiff prays for attorney's fees and general relief.

PHILIP C. FRIDAY, JR.
700 San Antonio Street
Austin, Texas 78701
512/472-9291
512/472-9302 (fax)
State Bar No. 07458000

/s/
Attorney for PLAINTIFF

STATE OF TEXAS *
*
COUNTY OF TRAVIS*

BEFORE ME, the undersigned authority, on this day personally appeared PHILIP C. FRIDAY, JR., who after being by me duly sworn, did s[t]ate upon his oath that he is the attorney of record for Emma J. Trahan, Plaintiff, in the above-styled and numbered cause; and that the allegations contained in the foregoing First Amended Motion for Contempt are true and correct.

/s/
PHILIP C. FRIDAY, JR.

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this the 26th day of March, 1993.

/s/
[SEAL] Notary Public in and for the State of Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's First Amended Motion for Contempt was mailed by fax to William R. Travis, Attorney for Defendant, at WEIR, APPELL & TRAVIS, at 469-0404, on this the 26th day of May, 1993.

NO. 344,539

JACK F. TRAHAN	§	IN THE DISTRICT
	§	COURT OF
V.	§	OF TRAVIS COUNTY,
	§	TEXAS, 200TH
EMMA J. TRAHAN	§	JUDICIAL DISTRICT

STIPULATION

EMMA J. TRAHAN and JACK F. TRAHAN and their respective attorneys of record hereby agree and stipulate as follows:

1. That JACK F. TRAHAN intentionally ceased paying to EMMA J. TRAHAN her share of his military retirement benefits as ordered in the Corrected Final Judgment heretofore signed in this Cause on November 15, 1983.

2. Such cessation occurred after the last payment due prior to November 5, 1992.

3. JACK F. TRAHAN believes that he is entitled to cease such payments under the 1990 Amendment to 10 U.S.C. § 1408(c)(1).

SIGNED and STIPULATED this 26th day of May, 1993.

/s/	/s/
JACK F. TRAHAN,	EMMA J. TRAHAN,
Plaintiff	Defendant

Weir, Appell & Travis
101 East 9th Street
Suite 708 [sic]
Austin, Texas 78701
512/469-0039
512/469-0404 (fax)

By: /s/
WILLIAM R. TRAVIS
State Bar No. 20195000
ATTORNEYS FOR
JACK F. TRAHAN

Philip C. Friday, Jr.
700 San Antonio Street
Austin, Texas 78701
512/472-9291
512/472-9302 (fax)
State Bar No. 07458000

/s/
ATTORNEY FOR
EMMA J. TRAHAN

PUBLIC LAW 101-510 -- NOV. 5, 1990
(104 STAT. 1569 - 1570)

SEC. 555. AMENDMENTS TO THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

(a) PROHIBITION OF CERTAIN RETROACTIVE COURT ORDERS. -- Subsection (c)(1) of section 1408 of title 10, United States Code, is amended by adding at the end the following new sentence: "A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.".

(b) REDUCTIONS ALLOWED FOR DETERMINATION OF DISPOSABLE RETIRED PAY. -- Subsection (a)(4) of such section is amended --

(1) by striking out the semicolon at the end of subparagraph (A) and inserting in lieu thereof "for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;"

(2) by striking out subparagraph (B) and inserting in lieu thereof the following:

"(B) are deducted from the retired pay of such member as a result of forfeitures of

retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;";

(3) by striking out subparagraphs (C) and (D); and

(4) by redesignating subparagraphs (E) and (F) as subparagraphs (C) and (D), respectively.

(c) CLARIFICATION OF STATUS OF PAYMENTS TO SPOUSES AND FORMER SPOUSES. -- Subsection (c)(2) of such section is amended by adding at the end the following new sentence: "Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of the member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.".

(d) CLARIFICATION OF LIMITS ON PAYMENTS OF RETIRED PAY. -- (1) Paragraph (1) of subsection (e) of such section is amended by striking out "payable under subsection (d)" and inserting in lieu thereof "payable under all court orders pursuant to subsection (c)".

(2) Paragraph (4)(B) of such subsection is amended by striking out "the disposable retired or retainer pay payable to such member" and inserting in lieu thereof "the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States".

(e) EFFECTIVE DATES. -- (1) The amendment made by subsection (a) shall apply with respect to judgments

issued before, on, or after the date of the enactment of this Act. In the case of a judgement issued before the date of the enactment of this Act, such amendment shall not relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act.

(2) The amendments made by subsections (b), (c), and (d) apply with only respect to divorces, dissolutions of marriage, annulments, and legal separations that become effective after the end of the 90-day period beginning on the date of the enactment of this Act.

(f) TECHNICAL AMENDMENTS. -- Such section is further amended --

(1) by adding at the end of subsection (a) the following new paragraph: "(7) The term 'retired pay' includes retainer pay."; and

(2) by striking out "or retainer" each place it appears.

(g) STYLISTIC AMENDMENTS. -- Such section is further amended --

(1) by inserting "DEFINITIONS. --" in subsection (a) after "(a)";

(2) by inserting "EFFECTIVE SERVICE OF PROCESS. --" in subsection (b) after "(b)";

(3) by inserting "AUTHORITY FOR COURT TO TREAT RETIRED PAY AS PROPERTY OF THE MEMBER AND SPOUSE. --" in subsection (c) after "(c)";

(4) by inserting "PAYMENTS BY SECRETARY CONCERNED TO SPOUSE OR FORMER SPOUSE. --" in subsection (d) after "(d)";

(5) by inserting "LIMITATIONS. --" in

subsection (e) after "(e)";

(6) by inserting "IMMUNITY OF OFFICERS AND EMPLOYEES OF UNITED STATES. --" in subsection (f) after "(f)";

(7) by inserting "NOTICE TO MEMBER OF SERVICE OF COURT ORDER ON SECRETARY CONCERNED. --" in subsection (g) after "(g)"; and

(8) by inserting "REGULATIONS. --" in subsection (h) after "(h)".

LEGISLATIVE HISTORY
HOUSE REPORT NO. 101-665

(1990 U.S. Code Cong. & Ad. News 3004-3005)

SECTION 555---AMENDMENTS TO UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

The Uniformed Services Former Spouses' Protection Act (USFSPA) (Public Law 97-252) was the product of substantial compromise among a wide diversity of opinions about the extent to which state courts ought to be able to divide military retired pay upon the divorce of a military member entitled to such pay. The legislation walks a narrow line between the rights of the states and the interests of the federal government in dealing with military retired pay in divorce settlements. The two modifications to current law the committee would make this year reflect a public policy judgment on the appropriate role of the federal government in limiting state court jurisdiction in divorce cases involving military retired pay that is consistent with the balancing of state and federal interests that has been the hallmark of this law since its inception.

The committee is concerned because some state courts have been less than faithful in their adherence to the spirit of the law. The reopening of divorce cases finalized before the Supreme Court's decision in *McCarty v. McCarty* that did not divide retired pay continues to be a significant problem. Years after final divorce decrees have been issued, some state courts, particularly those in California, have reopened cases (through partition actions or otherwise) to award a share of retired pay. Although Congress has twice stated in report language that this result was not intended, the practice

continues unabated. Such action is inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate.

Section 555 would provide that a court may not treat retired or retainer pay as property in any proceeding to divide or partition such pay of a member as the property of the member and his spouse if a final decree of divorce, dissolution, annulment or legal separation (including court ordered, ratified, or approved property settlements incident to such a decree) was issued before the *McCarty* decision and did not treat retired pay as property of the member and the member's spouse or former spouse. This provision would apply to judgments issued before, on, or after the date of the enactment of this Act, but only with respect to any requirement to make payments pursuant to such judgments after the date of enactment. Thus, individuals divorced before the *McCarty* decision who have had their cases reopened would not be relieved of the obligation to make payments until after the effective date of the Act.

LEGISLATIVE HISTORY
HOUSE CONFERENCE REPORT NO. 101-923

(1990 U.S. Code Cong. & Ad. News 3166)

Amendments to the Uniformed Services Former Spouses' Protection Act (sec. 555)

The House bill contained a provision (sec. 555) that would make two amendments to the Uniformed Services Former Spouses' Protection Act (USFSPA) (10 U.S.C. 1408).

The Supreme Court, in *McCarty v. McCarty*, 453 U.S. 210 [101 S.Ct. 2728, 69 L.Ed.2d 589] (1981) ruled that military retired pay could not be subject to division between the military member and the member's spouse as part of a divorce proceeding absent a federal statute permitting such division. Congress subsequently passed USFSPA to permit the division of military retired pay under specified circumstances, and to provide certain other benefits to former spouses of retired members of the armed forces. The intent of Congress, as expressed in the legislative history, was for the new law to have prospective effect only. A number of courts, however, have interpreted the law differently, and have reopened pre-*McCarty* decisions in order to award a share of retired pay to former spouses.

The House bill would provide that if a final decree of divorce, dissolution, annulment, or legal separation was issued before the *McCarty* decision and did not treat military retired pay as the property of both the retired member and the former spouse, then the court, subsequent to *McCarty*, may not divide retired pay between the retired member and

the former spouse. If a court, subsequent to *McCarty*, had entered such an order, the House bill would require the retired member to make any payments that were due before the enactment of this bill, but the member would be relieved of the obligation to make any further payments.

The House bill would also revise the computation of the amount of disposable retired pay that is subject to division under USFSPA. The current law excludes tax withholdings and certain federal debts of the servicemember. The House bill would eliminate these exclusions with respect to decrees of divorce, dissolution, annulment, or legal separation that become effective after the 90-day period beginning on the date of enactment of this bill.

The Senate amendment contained no comparable provision.

The Senate recedes with an amendment. The conferees agree that the original intent of Congress was to give prospective effect only to USFSPA without retroactive reopening of pre-*McCarty* cases. The conferees believe, however, that a reasonable period of time is needed for individuals to make adjustments required by the termination of payments ordered under decrees issued prior to the date of enactment of this bill. Accordingly, the conference agreement would require individuals to continue to make payments ordered prior to the date [of] enactment of this bill during the two-year period after such enactment.

Supreme Court, U.S.
FILED
MAR 20 1996
CLERK

No. 95-1191

In The

Supreme Court of the United States

October Term, 1995

JACK F. TRAHAN,

Petitioner,

v.

EMMA J. TRAHAN,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals, Third District, At Austin

RESPONDENT'S BRIEF IN OPPOSITION

PHILIP C. FRIDAY, JR.
Counsel of Record
700 San Antonio Street
Austin, Texas 78701
(512) 472-9291

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED BY PETITIONER

Whether the state court's refusal to apply 10 U.S.C. Sec. 1408(c)(1) to suspend a state judgment dividing military retired pay violates the Supremacy Clause of the United States Constitution?

LIST OF PARTIES

The caption of the case in this Court contains the names of the parties.

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OPINION BELOW

The opinion of the Texas Court of Appeals, Third District, at Austin (App. A-1 to the Petition), is reported at 894 S.W.2d 113. The denial of review by the Texas Supreme Court (App. A-18 to the Petition) and the refusal of rehearing by the Texas Supreme Court (App. A-19 to the Petition) were without opinion.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

In addition to the constitutional provisions and statutes cited by Petitioner, the case involves the following:

United States Constitution, Amendment V

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

10 U.S.C. Sec. 1408(c)(1).

> (1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such Court.

STATEMENT OF THE CASE

As set forth in the Petition, Petitioner and Respondent were divorced in 1965. The Divorce Decree made no

mention or disposition of Petitioner's military retired pay.

In 1982, Respondent "reopened" the Decree in a partition action, and recovered a portion of Petitioner's military retired pay in the Texas Court.

In 1993, Respondent obtained a Declaratory Judgment in the Texas Court that he was no longer obligated to make payment, by virtue of the 1990 Amendment to the Uniformed Services Former Spouse's Protection Act.

In 1995, the Texas Court of Appeals reversed the Declaratory Judgment, holding that (1) the doctrine of res judicata barred reopening the 1983 judgment regardless of the 1990 Amendment, and (2) the Trial Court's retroactive application of the 1990 Amendment to a valid judgment of a Texas Court is unconstitutional under the Due Process Clause of the United States Constitution. See opinion below, 894 S.W.2d at 113, 119.

REASONS FOR DENYING THE WRIT

I. The Texas Court correctly held that the 1990 Amendment is unconstitutional as applied to cut off Respondent's right to military retired pay affirmatively granted in a prior state court judgment.

The 1990 Amendment may not be constitutionally applied to deprive Respondent of rights vested in the Respondent by the 1983 Judgment. That Judgment is valid and subsisting, and it is res judicata of Respondent's rights in this case.

"As a general rule, retrospective laws are unconstitutional if they disturb or destroy existing or vested rights, as where they disturb or destroy existing or vested rights embodied in judgments or judicial decisions." 16A C.J.S., Constitutional Law Sec. 393, citing *Ziccardi's Case*, 192 N.E.29 (Mass.S.Ct., 1934), cert. denied, *Ziccardi v. Traveler's Ins. Co.*, 294 U.S. 716 (1935), reh'g denied 294 U.S. 733 (1935).

In *McCullough v. Virginia*, 172 U.S. 102, 125-125 (1898), this Court held as follows:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases.

Petitioner argues that "under the Supremacy Clause, all state law is preempted in the matter of military retired pay, except to the degree Congress has expressly permitted state law implication." In support of this proposition, Petitioner cites *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981); *United States v. Teller*, 107 U.S. 64, 68 (1883); *Frisbie v. U.S.*, 157 U.S. 160, 166 (1895); *Lynch v. U.S.*, 292 U.S. 571, 577 (1934); *Free v. Bland*, 363 U.S. 663 (1962); and *Wissner v. Wissner*, 338 U.S. 655 (1950).

However, **none** of the foregoing cases involved the doctrine of res judicata protection of rights affirmatively granted in a previous judgment. Moreover, *Ridgway v. Ridgway*, upon which Petitioner relies heavily, rested partially on this Court's conclusion that the serviceman's right there in question is ". . . personal to the member

alone. It is not a shared asset subject to the interest of another, as is community property." *Id.* at p. 60.

Moreover, in at least one case, *United States v. Larionoff*, 431 U.S. 864 (1977), this Court refused to give retroactive effect to a Congressional enactment repealing a special reenlistment bonus for service members. Although not a res judicata case, the decision was grounded on the proposition that the serviceman had a protected property interest in the bonus "for services already performed, but still owing." *Id.* at 879.

In *Mansell v. Mansell*, 490 U.S. 581 (1989), this Court dealt specifically with the issue of res judicata as it applied to the Uniformed Services Former Spouse's Protection Act. After examining the legislative intent and the precise language of the Act, this Court noted as follows:

> Whether the doctrine of res judicata . . . should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction.

Id. 490 U.S. at 586 at n.5.

Although Petitioner correctly states that the 1983 version of the statute addressed in *Mansell v. Mansell* did not have any provision for retroactive application, the primary basis of the footnote is in the long-standing policy of this Court in deferring to state law in the field of domestic relations. *Mansell v. Mansell, supra; Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

Petitioner cites *Fleming v. Rhodes*, 331 U.S. 100 (1947) for the proposition that a prior state court judgment establishing private rights cannot prevent the effect of

subsequent Congressional legislation. The question in *Fleming v. Rhodes* was whether a subsequent change in federal law could be used as the basis for an injunction against evictions under state court judgments. It is clear from the opinion, however, that this Court defined the question therein as one of enjoining "future proceedings." This Court specifically observed, "It is immaterial whether the state judgments [for eviction] were obtained before or after the effective date of the [subsequent federal legislation]." *Fleming v. Rhodes* at 106-7.

The eviction "rights" did not amount to "vested rights." The ultimate issue in the case was **possession** of the leased premises, which the landlords had not yet obtained. (Presumably, the enjoining court must have issued its injunction before the writ of possession was issued by the evicting court.) Had the landlords obtained possession, it is probable that their possession would have been viewed as a vested right; and the result of the case would have been different. In effect, the case remained pending until and unless the landlords obtained possession. It is well settled that the doctrine of res judicata does not apply to a final judgment when the law has changed during the appeal of the case. *State Farm Mut. Automobile Ins. Co. v. Duel,* 324 U.S. 154 (1945).

II. There are no compelling reasons to grant the Writ.

There are no "compelling reasons" to grant the Writ, as required by Supreme Court Rule 10.

Petitioner incorrectly argues that a great many military retirees would be adversely affected by the Texas

Court decision. To the contrary, the class of persons represented by Petitioner and Respondent is finite and not significant in number. It includes only those cases in which a former spouse was affirmatively granted an interest in military retired pay prior to the date of the 1990 Amendment, and then **only** those cases where the divorce occurred prior to June 25, 1981. A growing portion of these former spouses, like Respondent, are approaching the end of their lives.

The decision below is consistent with the policy of the 1990 Amendment, in that it does not allow the "reopening" of any cases in which an affirmative right to retired pay was not previously adjudicated. It is ironic that in the instant case, Respondent's 1983 Texas Judgment constituted a "reopening" of her 1965 Divorce Decree. The Texas trial court, by erroneously applying the 1990 Amendment to this situation, in effect permitted a "reopening" of a "reopening." Instead of carrying out the 1990 Amendment's purpose of leaving settled rights in place, the Texas trial court (prior to reversal by the Texas Court of Appeals) again stirred up controversy, and overturned settled rights.

Petitioner cites two decisions from the California Courts of Appeal which applied the 1990 Amendment to bar pension rights previously adjudicated in favor of former spouses. He mistakenly suggests that this difference in treatment is a "compelling reason" to grant the Writ. His argument ignores the fundamental operative provision of the Uniform Services Former Spouse's Protection Act, which allows state courts to deal with military retired pay **in accordance with state law**:

> (1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such Court.

10 U.S.C. Sec. 1408(c).

This Court has long followed a policy of deferring to state law in the domestic relations field:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

In re Burrus, 136 U.S. 586, 593-594 (1890).

The Court has more than once stated that "(s)tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. *United States v. Yazell*, 382 U.S. 341, 352 (1966)." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979).

No compelling reason exists for this Court to depart from its long standing policy in this case.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
APR 3 1996
CLERK

No. 95-1191

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JACK F. TRAHAN, *Petitioner,*

v.

EMMA J. TRAHAN, *Respondent.*

On Petition for a Writ of Certiorari to the
Texas Court of Appeals, Third District, at Austin

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED FOR REVIEW

Whether the state court's refusal to apply 10 U.S.C. § 1408 (c)(1) to suspend a state judgment dividing military retired pay violates the Supremacy Clause of the United States Constitution?

TABLE OF AUTHORITIES

Cases:

Buys v. Buys, 898 S.W.2d 903
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Redus v. Redus, 852 S.W.2d 94
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Trahan v. Trahan, 894 S.W.2d 113
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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent's Brief in Opposition glosses over the history of this litigation which is as follows:

(1) Emma Trahan brought a suit in 1977 to secure for herself a portion of her ex-husband Jack Trahan's military retirement benefits, culminating in a judgment that she was not entitled to any portion of the benefits, based on this Court's reasoning in *McCarty v. McCarty*, 453 U.S. 210 (1981). *See Trahan v. Trahan*, 626 S.W.2d 485 (Tex. 1981).

(2) In 1983, Emma Trahan filed a second suit, similar to the suit referenced *supra*, seeking again to receive a portion of Jack Trahan's military retired pay. In this second suit, she was successful because of an error of law now recognized by the same Texas Court of Appeals that decided the case (*see Trahan v. Trahan*, 894 S.W.2d at 116-7, or A-5 to 8 of Petition for Writ of Certiorari), but discretionary review of this judgment was denied by the Texas Supreme Court and by this Court. *Trahan v. Trahan*, 682 S.W.2d 332 (Tex. App. -- Austin 1984, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1002 (1986).

Because what occurred in the second round of litigation, *supra*, was happening generally in state courts across the country, Congress was called upon to remedy the situation and clarify and enforce its Congressional intent regarding military retired pay statutes. Congress did so by enacting the 1990 amendment, the clear Congressional intent of which was to prevent payments of portions of military retirement benefits to the spouses by virtue of various state court misreadings of the Congressional intent and language

of 10 U.S.C. § 1408 (c) (1), originally enacted in 1982, and recognized by the court below. 894 S.W.2d at 116-7, or A-5 to 8 of Petition for Writ of Certiorari. Congress recognized the existence of judgments such as the one involved in the second round of the *Trahan* litigation, and recognized that abrupt cessation of payments to the spouse would present some hardship. Congress gave such former spouses an adjustment period of two years, and after which date, payments to former spouses ceased and the total payments of military retired pay were to be solely the entitlement of the retired service member.

(3) In reliance on the enactment of the 1990 amendment by Congress, and after the two-year adjustment period had elapsed, Jack Trahan notified Emma that he would no longer forward a portion of his military retired pay to her and filed a declaratory judgment action seeking a declaration that Emma Trahan was entitled to no further portion of his retired pay. The Texas trial court applied the 1990 amendment and entered judgment for the declaratory relief prayed for by Jack Trahan. *See* A-21 to 23 of Petition for Writ of Certiorari. The Texas Court of Appeals reversed the trial court judgment, holding that the 1983 judgment in the second round of litigation, *supra*, was res judicata and that application of the 1990 amendment was a denial of due process to Emma Trahan. This case was not an isolated case at the time of the first and second rounds of litigation, and it is not an isolated case now. This Court declined to take jurisdiction and correct the situation that arose following the original enactment of 10 U.S.C. § 1408 (c) (1), thus setting the stage for Congress to revisit the subject matter of that Act by enacting the 1990 amendment.

Respondent's Brief in Opposition, and the court

below, both contend that the United States Congress cannot suspend the state court judgments that misinterpreted the 1983 version of 10 U.S.C. § 1408 (c) (1), because those judgments, although erroneous, have established vested rights in military retired pay. This position mistakenly assumes a vested right to military retired pay.

In *McCarty v. McCarty*, 453 U.S. 210 (1981), this Court held that in the matter of military retired pay, state law, including community property law, was pre-empted. When Congress made a change in the law in 1982 by enacting 10 U.S.C. § 1408 (c) (1), it only granted the states a limited right to treat military retired pay as community property. *Mansell v. Mansell*, 490 U.S. 581 (1989). As the court below has acknowledged, the 1983 statute did not grant the states the right to reopen divorce judgments involving service members that had been issued before the *McCarty* decision. 894 S.W.2d at 116 or A-6 to 7 of Petition for Writ of Certiorari. Nevertheless, state courts in the community property states used the statute as the basis to reopen pre-*McCarty* divorces to divide military retired pay that had not been mentioned in the decrees.

Having twice previously admonished the state courts in report language of its concern with this practice,[1] without apparent effect, Congress in 1990 enacted an amendment to 10 U.S.C. § 1408 (c) (1) that prohibited any new suits to reopen pre-*McCarty* divorces, and directly suspended state court judgments dividing military retired pay that were issued after pre-*McCarty* divorces. As the court below also acknowledged, the intent of Congress to cure the unintended

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[1] *See e.g.*, A-40 to 43 of Petition for Writ of Certiorari.

application of 10 U.S.C. § 1408 (c) (1) by the state courts was abundantly clear. 894 S.W.2d at 116-7 or A-8 to 9 of Petition for Writ of Certiorari. The idea that Congress, which has constitutional control over the military under Article I of the Constitution, cannot act to correct state court misapplications of federal law pertaining to military retired pay defies common sense as well as the Supremacy Clause.

This Court has rejected the argument that legislative alterations to military retired pay by Congress deprived retired military personnel of property without due process of law. *McCarty*, 453 U.S. at 222-3, n. 15, citing *U.S. v. Tyler*, 105 U.S. 244, 245 (1882). This conclusion follows from the fact that military retired pay is not deferred compensation for past services, but reduced compensation for reduced current services. *McCarty*, 453 U.S. at 222.

Respondent's Brief in Opposition argues that res judicata prevents Congress from correcting by subsequent legislation the misapplication of federal law by state courts, and cites *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154 (1945) as authority that, "It is well settled that the doctrine of res judicata does not apply to a final judgment when the law has changed *during the appeal of the case*." Brief in Opposition, at 5 (emphasis added). However, the *Duel* holding does not limit itself to changes in the law only during appeals:

> . . . [I]t is nevertheless the general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation.

Duel, 324 U.S. 154, 162 (1945). Congress amended 10 U.S.C. § 1408 (c) (1) in 1990 to correct the erroneous application of this federal statute by state courts, and res judicata is not a defense to application of the 1990 amendment. The lower court's contrary holding conflicts with this Court's opinion in *Duel*, *supra*, and provides a further reason for granting certiorari in the case at bar. *See* Supreme Court Rule 10 (c).

Respondent also alleges this Court should deny the writ of certiorari because this case is unimportant, even though the lower court has held the federal statute at issue unconstitutional. The fact that Congress had to enact the 1990 amendment to correct the misapplication of federal law by the state courts should be persuasive to this Court that this is a serious enough matter, and one of broad enough application to merit this Court's corrective action. Respondent argues that "the class of persons represented by Petitioner and Respondent is finite and not significant in number." Brief in Opposition, at 6.

According to the Department of Defense - Office of the Actuary, as of September 30, 1995, there were 154,243 Texas military retirees receiving retired pay, or 9.4 % of the total 1,632,273 military retirees in the United States receiving retired pay at that time. In California, the state that has upheld the 1990 amendment at issue herein, the number of military retirees receiving retired pay was 185,355, or 11.3% of total U.S. retired service members receiving retired pay. A significant number of these persons would meet the parameters of the 1990 amendment, that there was a divorce finalized prior to June 26, 1981 in which a court has later ordered a former spouse to receive a portion of military retired benefits. When it is recalled that a person

can retire from the military after twenty years of service, and that 1981 is only fifteen years ago, it is apparent that there are many retired persons in the age range 55 - 75 who could be involved in this situation.

Additionally, although there is no way of determining the number of similar cases pending in Texas trial courts, the number of reported appellate cases concerning the 1990 amendment contradicts Respondent's assertion that this case is unimportant. In addition to the case at bar, which conflicts with the California courts' interpretation of the same federal statute at issue, *In re Marriage of Curtis*, 9 Cal.Rptr.2d 145 (Cal.App. 1 Dist. 1992, review denied), and *In re Marriage of Olson*, 30 Cal.Rptr.2d 306 (Cal.App. 2 Dist. 1994, review denied), another Texas court of appeals, citing the case at bar, has held a retired military service member in contempt for not making payments to his spouse under a 1988 partition order that was suspended by the 1990 Congressional amendment. *See Ex parte Kruse*, 911 S.W.2d 839, 841 (Tex. App. -- Amarillo 1995, habeas relief requested in Tex. Sup. Ct. Feb. 5, 1996). This recent Texas case makes clear that the lower court's opinion in *Trahan* will be used by Texas courts (as in *Kruse*) to ignore Congress' mandate in enacting the 1990 amendment to 10 U.S.C. § 1408 (c) (1).

In addition to these four appellate cases from Texas and California, there are at least thirteen additional state and federal authorities dealing with the other aspect of the 1990 Amendment, the prohibition of any further attempts to reopen pre-*McCarty* divorces that did not divide military retired pay at the time of divorce. *See Johnson v. Johnson*, 824 P.2d 1381 (Alaska 1992); *Kemp v. U.S. Dept. of Defense*, 857 F.Supp. 32 (W.D. La. 1994); *Dunham v.*

Dunham, 602 So.2d 1139, 1141, n. 1 (La.App. 1 Cir. 1992, writ denied); *Johnson v. Johnson*, 605 So.2d 1157, 1161 (La.App. 2 Cir. 1992, writ denied); *White v. White*, 623 So.2d 31, 34 (La.App. 1 Cir. 1993, no writ); *Mote v. Corser*, 810 S.W.2d 122 (Mo.App. S.D. 1991); *Mings v. Mings*, 841 S.W.2d 267 (Mo.App. S.D. 1992); *Knox v. Born*, 879 S.W.2d 600 (Mo.App. E.D. 1994); *Terry v. Lee*, 445 S.E.2d 435, 437-8 (S.C. 1994); *Knowles v. Knowles*, 811 S.W.2d 709 (Tex. App. -- Tyler 1991, no writ); *Redus v. Redus*, 852 S.W.2d 94 (Tex. App. -- Austin 1993, writ denied); *Walton v. Lee*, 888 S.W.2d 604 (Tex. App. -- Beaumont 1994, writ denied), *cert. denied*, 116 S.Ct. 190 (1995); and *Buys v. Buys*, 898 S.W.2d 903 (Tex. App. -- San Antonio 1994, writ granted). Contrary to Respondent's assertion of unimportance, there is a significant amount of litigation concerning the 1990 amendment to 10 U.S.C. § 1408 (c) (1).

Respondent's further contention that this case is unimportant because many of the class of persons represented by Petitioner and Respondent are nearing the end of their lives (Brief in Opposition at 6) is not only harsh, it overlooks the fact that many pre-*McCarty* divorces of the type involved here were granted while service members were still on active duty. Throughout the 1970's, Texas and the other community property states treated unmatured military retired pay as a contingent property interest, divisible at divorce, and hence subject to the type of suits reopening those divorces that occurred in this case. Many of these members who were divorced in the 1970's, although now retired, are in their forties or fifties.

The courts in California and Texas have reached opposite results in interpreting this federal military retired

pay statute, and it is not because of differences in state law. This conflict between the two largest community property states needs to be resolved before other retired military service members are subjected to legal penalties by state courts, including contempt, *see Ex parte Kruse*, *supra*, for compliance with the 1990 Congressional amendment. Petitioner respectfully asks this Court to grant the petition for writ of certiorari, set this case for consideration with briefs on the merits and oral argument, and reverse the judgment of the Texas Court of Appeals, Third District, at Austin, and affirm the judgment of the trial court (A-21 of Petition for Writ of Certiorari).

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